

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

MAUREEN METIVIER,

Plaintiff

v.

**YORK CUMBERLAND ASSOCIATION
FOR HANDICAPPED PERSONS, d/b/a
CREATIVE WORK SYSTEMS,**

Defendant

Docket No. 04-176-P-H

MEMORANDUM DECISION ON MOTIONS TO AMEND

On September 3, 2004 the plaintiff filed a motion to amend the complaint which she had filed to initiate this action on August 10, 2004. Motion to Amend Complaint (Docket No. 5). In that motion, she seeks to divide one count into two and add a demand for reinstatement to her claims arising out of her employment by the defendant. *Id.* The defendant opposes the motion, contending that the new count proposed by the plaintiff is futile because its claim would be preempted by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a), and fails to state a claim on which relief could be granted under that statute. Defendant's Oppos[i]tion to Plaintiff's Motion to Amend Complaint (Docket No. 6) at 1. The plaintiff's reply asserts that the proposed Count III does in fact state a claim under ERISA, essentially conceding that insofar as it purported to state a claim under state law, Count III is preempted by ERISA. Plaintiff's Reply to Defendant's Objection to Plaintiff's Motion to Amend Complaint (Docket No. 7) at 2-4.

At the same time, the plaintiff filed a second motion to amend her complaint, proposing a Count III that would clearly assert a claim under ERISA and otherwise seeking the same relief that is sought in her first proposed amended complaint. Second Motion to Amend Complaint (Docket No. 8). In response, the defendant objects only to the demand included in the proposed second amended complaint for a jury trial on the ERISA claim, which it contends is unavailable. Defendant's Oppos[i]tion to Plaintiff's Motion to Amend Complaint (Docket No. 9) at 2-3. The plaintiff then filed a reply stating that she "does not object to defendant's request that plaintiff's motion to amend her complaint be granted subject to the restriction that her claim under § 510 [ERISA] will be decided by the court and not by the jury." Plaintiff's Reply to Defendant's Partial Opposition to Motion to Amend Complaint (Docket No. 10).

It appears that the parties have now agreed on the form that the plaintiff's amended complaint should take. I conclude that the first motion (Docket No. 5) is **MOOT**. The second motion (Docket No. 8) is **GRANTED** with the following condition: the plaintiff is directed to file an amended complaint in the form of the Proposed Second Amended Complaint (filed with Docket No. 8) except that Paragraph 38 shall be modified to make clear that the plaintiff is not demanding a jury trial on Count III.

Dated this 15th day of November 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

MAUREEN METIVIER

represented by **CURTIS WEBBER**
LINNELL, CHOATE & WEBBER,

LLP
P. O. BOX 190
AUBURN, ME 04212-0190
784-4563
Email: cwebber@lcwlaw.com

V.

Defendant

CREATIVE WORK SYSTEMS

represented by **GLENN ISRAEL**
BERNSTEIN, SHUR, SAWYER, &
NELSON
100 MIDDLE STREET
P.O. BOX 9729
PORTLAND, ME 04104-5029
207-774-1200
Email: gisrael@bssn.com